No. 85-1599

Supreme Court, U.S.
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MAR 28 1986
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CLERK

IN THE

Supreme Court of the United States

October Term, 1985

CITY OF SAN DIEGO, et al.,

Petitioners,

v.

SPORTS ARENAS PROPERTIES, et al.,

Respondents.

On Writ of Certiorari to the
Supreme Court of California

PETITION FOR CERTIORARI

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March 31, 1986

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QUESTIONS PRESENTED

1. Did HUD acquisition of a HUD insured project upon default of the owners/developers extinguish the terms and conditions of a municipal conditional use permit which require the project to be operated on a nonprofit basis for senior citizens only, thus preventing Petitioner from enforcing said conditions?

2. Does the operation of an apartment complex as a low- and moderate-income multi-family project under 12 U.S.C. 1715l, even though originally developed under a conditional use permit which requires its operation as a nonprofit project for senior citizens, contravene congressional intent?

3. Do HUD regulations preempt local zoning controls in spite of clear statutory language indicating congressional intent that HUD insured projects are to comply with local land use law?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners include those parties to the proceedings below as follows:

> The City of San Diego, Mayor and City Council of The City of San Diego, Charles Abdelnour, Clerk of the City of San Diego, University City Village Tenants Association, and Gertrude Evans.

Respondents include those parties to the proceedings below as follows:

> Sports Arenas Properties, Inc., Kopler Enterprises, Inc., and Chase Hotels, Inc.

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The petitioner, City of San Diego, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California.

OPINION BELOW

The opinion of the California Supreme Court, reported at 40 Cal.3d 808 appears in Appendix A hereto.

JURISDICTION

The judgment of the California Supreme Court was entered on December 31, 1985. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

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STATEMENT OF THE CASE

In March, 1962, the Foundation for Specialized Group Housing applied to Petitioner City of San Diego "to construct and operate a nonprofit senior citizen housing project under the requirements specified in the Federal Housing Act, Title II, Section 231." The application stated that the project would be operated by a "qualified nonprofit organization" and occupancy would be restricted "to senior citizens who qualify." The City's Planning Commission recommended denial of the application on the basis that the planned 549 apartment units in 78 buildings created an unacceptable density. The City, however, overruled the Planning Commission's decision and issued the conditional use permit (CUP).

The preamble to the CUP set forth the wording from the application indicating it was issued pursuant to the request of the Foundation for Specialized Group Housing to construct and operate a nonprofit senior citizens housing project. The first condition referred to the "proposed senior citizens housing project" but none of the other seven conditions mentioned or defined the terms "senior citizens" or "nonprofit." There are no provisions in the permit expressly limiting operation or occupancy or expressly prohibiting sale or transfer of the property. Appendix B.

After the submission and approval of a revised plot plan, the property was acquired by a profit corporation and constructed with private financing insured under Section 221 of Title II of the National Housing Act, 12 U.S.C.A. Section 1715l (1980) as low- and moderate-income multi-family housing. Appendix C. Tenants initially were limited to those 50 years of age or older and have always comprised a large part of the tenant population, even though the project was not insured under and regulated as a Title II, National Housing Act, Section 231, 12 U.S.C.A. Section 12715v (1980). Appendix C.

In 1966, the Department of Housing and Urban Development (HUD) acquired the project from the lender in accordance with its insurance agreement and operated the project for nearly three years renting to persons 21 years of age or older. In 1968, HUD sold the property to an affiliate of one of the respondents and the predecessor of another, all for-profit corporations. Until the property was refinanced and the HUD note paid off, the owners operated University City Village as multi-family low- and moderate-income housing.

In 1979, respondents filed and the City denied an application for a tentative subdivision map to convert to condominium units. Respondents sought to compel the City to permit conversion by a writ of mandate and also sought declaratory relief. Petitioner City answered and filed a cross-complaint seeking an injunction to require respondents to operate the project on a nonprofit basis and to rent only to senior citizens. Petitioners Gertrude Evans, a tenant, and the University Village Tenants Association intervened in support of Petitioner City. The trial court denied the petition for writ of mandate and enjoined respondents from operating the apartments on other than a nonprofit basis and from renting any apartment unless one tenant is at least 55 years old. Nonprofit basis was defined as meaning that "gross operating income does not exceed reasonable operating expenses."

Respondents appealed to the Fourth District Court of Appeal which reversed the lower court, holding that the CUP is vague and ambiguous and that because the CUP was not recorded and respondents denied actual knowledge of the terms of the CUP, it was unenforceable as against them as successors-in-interest. Petitioners petitioned the California Supreme Court for hearing, briefing all issues heretofore raised including the challenge to the San Diego Condominium Conversion Ordinances (which was abandoned by Respondents prior to hearing), the enforceability of the conditional use permit to successors-in-interest, and the interpretation of the terms and the validity of the restrictions. The issue of

the HUD acquisition and resulting extinguishment of the condition that the project be operated on a nonprofit basis and rented only to senior citizens was not briefed.

The California Supreme Court in its opinion filed December 31, 1985, held that all the terms and conditions of the CUP would be valid and enforceable against the present owners had not HUD repossessed the project upon default of the developer thereby extinguishing the existing terms and conditions. It held that upon acquisition of the project, HUD had the discretion to determine to whom it would sell and the restrictions to be placed on the new purchaser, thereby imposing or reimposing a new set of restrictions. Appendix A-10.

REASONS FOR GRANTING THE WRIT

1. The decision below raises important and reoccurring issues concerning the effect of federal statutes on state and local efforts to provide affordable housing for all citizens through local zoning controls.

Throughout San Diego and other cities across the United States, local governments attempt to provide for the housing needs of all segments of society, including the elderly, the poor, those of middle income, and other groups who have special needs. This is in part accomplished through zoning devices such as conditional use permits, variances, and planned residential developments. Such permits allow uses not otherwise authorized by the applicable zoning ordinance and, at the same time, limits and conditions the use in certain ways. Appendix A-5. The developments which are authorized by the special permits are often directly financed by the federal government or developed with private funds insured by an arm of the federal government.

In the case of housing for the elderly, projects can be built and financed by private parties, with the financing insured by HUD pursuant to 12 U.S.C. 1715v. HUD in turn imposes regulations pertaining to its construction, operation, occupancy, rent and other financial matters. One of the applicable regulations the City relies upon in its planning specifies that the project "shall not violate any material zoning or deed restrictions applicable to the project site, and shall comply with all applicable building and other government regulations." 24 C.F.R. Section 231.10(b) (1980). The statute pertaining to housing for low- and moderate-income families is even more specific; 12 U.S.C. 1715l(d)(2) mandates that dwellings on secured property meet "the requirements of all state laws, or local ordinances or regulations, relating to the public health or safety, zoning, or otherwise, which may be applicable thereto . . ." 24 C.F.R. Section 221.545(c) also requires compliance of such projects with local zoning, deed restrictions and building and other government requirements.

Petitioner City issues conditional use permits with the expectation that, as HUD insured developments, compliance with local land use regulations is assured. In the instant case, the CUP was granted with the expectation that the project would always be occupied primarily by senior citizens. In fact, the CUP was issued in spite of objections by the Planning Commission regarding the project's density because the developers claimed that it would house fewer people as a senior citizens project than a similar project not so limited. Appendix A-3. Local school and park construction and planning reflect the elderly population. Further, a condition of the CUP authorized fewer parking spaces for the residents of University City Village because the project was primarily for elderly citizens who own and drive fewer cars.

HUD, in turn, had no reason to know that the developers were violating the terms of the CUP simply be applying for insurance for a low- and moderate-income multi-family project. HUD had no reason to know that development of University City Village as a Section 221 project was in contradiction to local zoning regulations, and consequently its own regulations. Further, HUD did

not intend to preempt local zoning restrictions, including those terms and conditions in the CUP, either in the development, operation upon acquisition or regulation as a Section 221 project after disposition. Indeed, HUD apparently believed that it was perpetuating the lawful and proper use as a low- and moderate-income multi-family project.

However, the lower court held that HUD can preempt local zoning regulations in its discretion and that terms and conditions integral to the CUP and the City's housing plans can be nullified or changed upon acquisition by HUD or the subsequent sale by HUD to a private purchaser. The lower court's finding of federal preemption of local zoning, in spite of clearly articulated congressional intent to the contrary, and in spite of facts indicating that HUD did not intend that its regulations preempt local zoning regulations, is error. If allowed to stand, cities throughout California will be wary of projects financed or insured by HUD and their plans to provide for the housing needs of all their citizens will be jeopardized.

2. The lower court's ruling is contrary to long standing federal preemption law as articulated by this court.

In a recent decision of this court, *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. __, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985), the Supremacy Clause, U.S. Constitution Article VI, Clause 2, is explored and analyzed. This court stated that pursuant to the Supremacy Clause, federal law supersedes state law when congress is empowered to preempt state law by so stating in express terms, where congress intends to preempt state law in a particular area although not articulated, or where state or local law conflicts with federal law. "The question whether the regulation of an entire field has been reserved by the federal government is, essentially, a question of ascertaining the intent underlying the federal scheme." *Id.* 471 U.S. at __, 85

L.Ed.2d at 721 and 105 S.Ct. at 2375. In the instant case, one does not need to go beyond the express terms of the applicable statute and HUD regulations. It is abundantly clear that no conflict exists between local and federal law and that congress did not intend that local zoning and land use regulations be preempted by looking to the relevant sections in the National Housing Act requiring compliance with local zoning, building laws and other local regulations.

In the case cited above, *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, the municipal ordinance at issue regulated the collection of blood plasma from paid donors supplementing federal regulations promulgated by the Food and Drug Administration establishing standards for such collection. The holding of the case lends support to an analogous lower court decision involving federal preemption of municipal land use regulations. In *Stewart v. U.S. Postal Service*, 508 F.Supp. 112 (D.C. Cal. 1980), the court held that the Post Office need not comply with city zoning where federal law is in conflict. However, the court stated that, had the Post Office articulated its intent by statute to comply with local laws, the Post Office would be required to comply with municipal land use regulations. In the instant case, there is express language requiring the relevant HUD projects to be in compliance with local zoning, building and other land use regulations; the CUP should, therefore, be enforceable by Petitioner City.

CONCLUSION

The California Supreme Court's decision precluding Petitioner City from enforcing all the terms and conditions of Conditional Use Permit No. 4826 is contrary to HUD's own regulations, congressional intent and well established preemption law. Because allowing the decision to stand would create disarray in local governments' efforts to provide housing for all citizens in a well planned manner, this Court should take the opportunity to

reaffirm established preemption law as it applies to situations involving local land use law.

DATED: March 31, 1986

Respectfully submitted,

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Counsel for Petitioners

APPENDICES

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L.A. No. 31987

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SPORTS ARENAS PROPERTIES

v.

CITY OF SAN DIEGO

SUPREME COURT
FILED
DEC 31 1985
Laurence P. Gill, Clerk
DEPUTY

Submitted

Bird
Chief Justice

SUPREME COURT
FILED
DEC 31 1985
LAURENCE P. GILL, Clerk
Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SPORTS ARENAS PROPERTIES, INC., et al.,

Plaintiffs, Cross-defendants and Appellants,

v.

CITY OF SAN DIEGO, et al.,

Defendants, Cross-complainants and Respondents.

UNIVERSITY CITY VILLAGE TENANTS ASSOCIATION et al.,

Interveners and Respondents.

L.A. 31987

(Super. Ct. Nos. 448425 and 456802)

Plaintiffs appeal from a judgment enjoining them from renting their apartments except to senior citizens on a non-profit basis.[1] We conclude that the injunction must be vacated because the trial court misinterpreted the conditional use permit pursuant to which the project was to be built.

[1] The judgment also denied a petition for writ of mandate seeking to compel defendant city to approve conversion of the apartments to condominiums. Although plaintiffs appealed, they have abandoned their appeal from this part of the judgment.

SEE CONCURRING AND DISSENTING OPINION

In March 1962, the Foundation for Specialized Group Housing applied to the City of San Diego "to construct and operate a non-profit senior citizen project under the requirements specified in the Federal Housing Act, Title II, Section 231. The project will consist of 549 apartment units in 78 buildings providing beautiful and adequate community facilities. The project will be operated by a qualified non-profit organization, The Foundation for Specialized Group Housing. Occupancy is restricted to senior citizens who qualify."

The city owned the property at the time of the application but a month later the city conveyed the property to University City, Inc., a corporation organized for profit.

Although its planning commission recommended denial of the application,[2] the city issued the conditional use permit in June as follows:

"That Conditional Use Permit, Case No. 4826, requested by The Foundation for Specialized Group Housing to construct and operate a non-profit Senior Citizens Housing project located south of Governor Drive between Genesee Avenue and Boundary Freeway, in the R-1 zone, documented as No. 639744, May 31, 1962, in the office of the City Clerk, be, and the same is hereby approved subject to the following conditions:

"1. That prior to the issuance of any building permits, complete building plans of the proposed senior citizens housing project (including signs) shall be submitted to the Planning Director for approval. Said plans shall be in substantial conformity with Exhibit 'A' on file in the Office of the Planning Department. The property shall be developed in accordance with the approved building plans except where regulations and this and/or other governmental agencies require deviation therefrom."

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[2]The planning commission objected to the project's density; the developers claimed that because the project was for senior citizens, it would house fewer people than a similar project not so limited.

Seven additional conditions were appended to the permit relating to matters such as the filing of a subdivision map, landscaping and parking, but none of the other conditions mentioned "senior citizens" or "nonprofit." The conditional use permit was not recorded by the county recorder. There is no provision in the permit expressly prohibiting sale or transfer of the property.

The foundation did not acquire the property or construct or operate the project. University City, Inc., in 1963 submitted a revised plot plan reducing the number of units, deleting a medical facility, and adding a nine-hole golf course. The documents submitted did not include any references to "senior citizens" or "nonprofit." The revision was approved.

The property was transferred between several profit corporations apparently affiliated with University City, Inc., and was ultimately built with private financing insured under section 221 of title II of the National Housing Act (12 U.S.C.A. § 1715l) as low- and moderate-income housing rather than section 231 of the act (12 U.S.C.A. § 1715v). Tenants initially were limited to those 50 years of age or older.

The developers were able to rent only about one-third of the units, and they defaulted on the federally insured financing. The Department of Housing and Urban Development (HUD) acquired the project from the lender in accordance with its insurance agreement and operated the project for nearly three years renting to persons 21 years of age or older. In 1968, HUD sold the properties to an affiliate of one of the plaintiffs and the predecessor of the other. HUD received a down payment and a note secured by deed of trust for more than $6 million. After the HUD sale, the property was owned and operated by profit corporations under a letter agreement with HUD. Under the agreement, the total amount of rent to be charged was fixed to cover estimated expenses and debt service and to provide a profit to the owners. It does not appear that any means test was applied to tenants. Property taxes were paid on the property.

The property was refinanced, and the HUD note was paid off. In 1979 plaintiffs filed an application for a tentative subdivision map to convert to condominium units. The city denied the application.

Plaintiffs then commenced the instant proceeding to compel the city to permit conversion to condominiums. They also sought declaratory relief. The city answered and filed a cross-complaint seeking an injunction to require plaintiffs to operate the project on a nonprofit basis and to rent only to senior citizens. One of the tenants and the tenants' association intervened and supported the city's position.

The trial court denied the petition for writ of mandate and enjoined plaintiffs from operating the apartments on other than a nonprofit basis and from renting any apartment unless one tenant in it is at least 55 years old. Nonprofit basis was defined as meaning that "gross operating income does not exceed reasonable operating expenses."[3]

THE CONDITIONAL USE PERMIT

A. Existence of a Restriction

Plaintiffs first contend that the conditional use permit did not restrict the use of the property to nonprofit senior citizen rental housing because the express conditions of the permit did not include requirements that the property be used for senior citizens on a nonprofit basis. It is urged that only the conditions enumerated restrict the permit, that the terms nonprofit and senior citizen appear in the recitals of the permit, that there is no reference to nonprofit in the conditions and that the only reference to senior citizen

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[3] During the pendency of this proceeding, plaintiffs increased rents; we stayed further increases.

in the conditions is merely to describe the project and is not a limitation.

Ordinarily, a zoning ordinance permits certain uses for an area but provides that other uses may be permitted after consideration by a governmental agency as to whether the proposed other use will be in the best interests of public convenience and necessity and not contrary to the public welfare. (Upton v. Gray (1969) 269 Cal.App.2d 352, 357; Tustin Heights Assn. v. Bd. of Supervisors (1959) 170 Cal.App.2d 619, 626.) A conditional use permit, unlike a nonconforming use, allows a use permitted rather than proscribed by the zoning regulations, but because of the possibility that the permitted use could be incompatible in some respects with the applicable zoning, a special permit is required. (County of Imperial v. McDougal (1977) 19 Cal.3d 505, 510.)

When a conditional use permit is obtained, the permittee may make those uses of the property authorized by the zoning ordinance in the absence of a permit and in addition those uses authorized by the permit. But the conditional use permit does not permit uses authorized neither by the permit nor by the zoning ordinance without permit. Thus, the use permitted is both a grant of authority to use and a limitation on the authorized uses of the property.

The conditions of the permit further limit the authority to use the property pursuant to the use permit, and if the permittee exercises its authority to use the property in accordance with the permit, it must accept the burdens with the benefits of the permit. (County of Imperial v. McDougal, *supra*, 19 Cal.3d 505, 510-511.) Absence of conditions in the use permit does not mean that the permittee may make uses of the property permitted neither by the use permit nor by the zoning ordinance without permit.

We reject plaintiffs' claim that the absence of express conditions limiting the use to nonprofit and senior citizens means that the property was not limited to those uses. The use of the property

after issuance of the permit was limited to those uses permitted by the zoning ordinance in the absence of permit and the one authorized by the permit, a "non-profit Senior Citizens Housing project."

B. Interpretation and Validity of the Restriction

Plaintiffs next urge, and the Court of Appeal concluded, that the terms of the conditional use permit are vague, uncertain and ambiguous and may not be enforced.[4] However, the permit must

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[4] In concluding that the conditional use permit was vague, uncertain and ambiguous, the Court of Appeal pointed out:

"The National Housing Act (tit. 12, U.S.C.A., ch. 13, §§ 1701-1750g) refers to public or nonprofit private agencies. The term "corporation" means any incorporated private institution or foundation [¶] (A) no part of the net earnings of which inures to the benefit of any member, founder, contributor, or individual; [¶] (B) which has a governing board (i) the membership of which is selected in a manner to assure that there is significant representation of the views of the community in which such project is located, and (ii) which is responsible for the operation of the housing project assisted under this section; and [¶] (C) which is approved by the Secretary as to financial responsibility.' (§ 1701q(d)(2).)

"Nonprofit activities, nonprofit associations, nonprofit charitable organizations, nonprofit community organizations, nonprofit cooperative associations, nonprofit corporations, nonprofit organizations, nonprofit property owners' associations and other nonprofit agencies found in our codes suggest myriad forms of such activities and include specific definitions (see West's Ann. Cal. Codes, Gen. Index, MO to Q (1981 ed.)).

"The phrase 'senior citizen' did not have a legal or dictionary definition in 1962. The National Housing Act, *supra*, as of 1962, defined elderly persons as 62 years of age or older (§ 1701q(d)(4); § 1715l(f); § 1715v(a)(2)). The Slum Clearance, Urban Renewal and Farm Act defined elderly persons as 62 years of age or older (tit. 42, ch. 8A, § 1471). The Social Security Act defines an aged individual as 65 years or older (tit. 42, U.S.C.A., ch. 7, Social Security, § 1382c; § 1395c). . . .

"California legislation enacted since 1962 uses various phrases in reference to older persons. The California Interdepartmental Committee on Aging provides services and programs for 'older Californians' (Welf. & Inst. Code, §§ 9340-9353) and area agency aging advisory councils are concerned with 'older persons' (Welf. & Inst. Code, §§ 9360-9365). The Elder Abuse Reporting Act refers to an 'elder' as a person 65 years of age or older (Welf. & Inst. Code, §§ 9380-9386). In 1977,

(fn. continued)

be read in the light of the application for it, and when that is done, it is apparent that the terms of the permit are clear. The application shows that the nonprofit senior citizens housing project is described in the Federal Housing Act, title II, section 231. The permit states that the application is "approved." It is apparent that the city council by approving the application intended that the term "non-profit Senior Citizen Housing project" in the permit have the same meaning as that term is given in the application, a project "under the requirements specified" in section 231. That section establishes the definition of nonprofit senior citizen housing.

Section 231 added in 1959 (73 Stat. 665 [12 U.S.C.A. § 1715v]) established a program for insurance of mortgages on housing for the elderly by the federal government. The purpose of the section "is to assist in relieving the shortage of housing for elderly persons and to increase the supply of rental housing for elderly persons." The term "elderly person" is defined as any person who is 62 years of age or over. The word "housing" is defined as eight or more new or rehabilitated living units, not less than 50 percent of which are specially designed for the use and occupancy of elderly persons.

(fn. 4 continued)

the phrase 'senior citizen' first appears in the Multipurpose Senior Citizens Project legislation in defining a 'senior citizen' as a person 65 years of age or older (Welf. & Inst. Code, §§ 9400-9413) and in 1983 the Multipurpose Senior Services Program provided for persons aged 65 or older (Welf. & Inst. Code, §§ 9520-9527) and the Foster Grandparent Program refers to those participating as being 60 years or older (Welf. & Inst. Code, §§ 9400-9409). The Senior Companions Program defines adults 60 years of age or older as 'senior companions' (Welf. & Inst. Code, §§ 9540-9544). The California Community Crime Resistance Program defines an 'elderly or senior citizen' as an individual 55 years of age or older (Pen. Code, § 13841, subd. (b)). A claimant under the Senior Citizens Homeowners and Renters Property Tax Assistance Law is an individual 62 years of age or older (Rev. & Tax. Code, § 20505) who owns or rents a residence. The California Commission on Aging acts on behalf of 'older persons' (Welf. & Inst. Code, § 9201)."

The section provides that the mortgages insured may be equal to the lesser of certain maximum amounts per unit and replacement cost of the project if executed by a nonprofit corporation or public agency, and if not so executed, 90 percent of replacement cost, which may include an allowance for builder's or sponsor's profit and risk of 10 percent of costs other than land. A nonprofit corporation is organized for purposes other than profit of the organization or persons identified with it. (24 C.F.R. § 231.2(j).) The nonprofit corporation is one "regulated or supervised under Federal or State laws or by political subdivisions of States, or agencies thereof, or by the Secretary under a regulatory agreement or otherwise, as to rents, charges, and methods of operation." (12 U.S.C.A. § 1715v(c)(3).)

Under the section the mortgage must provide for a complete amortization. (12 U.S.C.A. § 1715v(c)(5).) The section incorporates provisions (12 U.S.C.A. § 1713) dealing with foreclosure for default, operation by HUD of properties acquired, and resale.[5] When property is acquired, the property may be sold for cash or credit or leased in the discretion of the Secretary of HUD for the protection of the insurance fund. (12 U.S.C.A. § 1713(l); 24 C.F.R. § 290 et seq.)

Although section 231 does not use the term "senior citizen" but instead the term "elderly person," the two terms must be treated as identical, otherwise the section, contrary to the express terms of the application, would not be applicable. It is also clear that "nonprofit" as used in the section means a nonprofit corporation

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[5] Section 221 of title II of the National Housing Act under which the project was originally financed contains roughly similar provisions for insurance of mortgages for housing for low- and moderate-income families and displaced families. (12 U.S.C.A. § 1715l.)

as mortgagor; the word is not used in the section to refer to operation on a nonprofit basis.[6]

We conclude the conditional use permit incorporated the provisions of section 231 and therefore the permit is not vague, uncertain or ambiguous in using the term nonprofit senior citizen housing. However, it does not follow that the injunctions may be sustained on the basis of the permit.

C. The Condition and the Injunction

The permit did not restrict the use of the property to nonprofit senior citizen housing in the event that HUD was required to take over the project under its guarantee. When HUD took over the property, it was not under a duty to sell the property to a nonprofit agency but could sell to profit-making organizations, and it was not under a duty to limit the use of the property to senior citizens or moderate- or low-income tenants.

The permit, as we have seen, incorporates the provisions of section 231. Thus it incorporates the part of the section expressly incorporating the provisions of 12 United States Code Annotated section 1713(l). (12 U.S.C.A. § 1715v(e); see also 12 U.S.C.A. § 1715l(g).) The term "non-profit Senior Citizens Housing Project" in the permit used to describe the project described in the application may not reasonably be interpreted to incorporate the provisions of section 231 and at the same time to exclude some of the provisions of the section. Under section 1713(l) HUD is authorized to sell property acquired for cash or credit in its

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[6] A nonprofit organization which successfully manages a section 231 project would ordinarily make substantial gains. As pointed out above, the mortgage must provide for complete amortization (12 U.S.C.A. § 1715v(c)(5)), and during the amortization period, a successful nonprofit organization would be building equity and at the end of the period it would be in the same position as any other owner which had paid off its mortgage. Increases in equity would permit a nonprofit organization dedicated to providing housing for the elderly to refinance and build additional projects, furthering the congressional purpose of increasing the supply of housing for the elderly.

discretion for the protection of the insurance fund. While local concerns and the purposes for which the project was built are factors to be considered in disposing of multifamily projects, the factors are to be considered along with HUD's objective of protecting the financial interests of the government and producing a satisfactory return to the mortgage insurance funds. (24 C.F.R. § 290.20.) Obviously, limitation of sale to a nonprofit agency could seriously impair HUD's ability to protect the insurance funds. Since the permit provision for nonprofit senior citizen housing contemplated sale to a profit-making organization by HUD upon such limitations as it found proper, the trial court could not properly impose additional limitations on the basis of the provision.

Because the conditional use permit authorized a section 231 project, HUD, once it acquired the property under its guarantee, had the power to determine to whom it would sell and the restrictions to be placed on the purchaser. It does not appear that plaintiffs are in violation of any HUD restrictions.

D. Failure to Comply With the Permit

The developer of the project did not proceed under section 231 and the project was not operated by the Foundation for Specialized Group Housing, a nonprofit corporation, as provided in the application for the permit. Thus the project was not built and operated in accordance with the permit. Section 231 financing and regulation applies only to new projects and certain new rehabilitation projects. It does not seem possible at the present time to comply with the permit without tearing the project down.

The question arises whether the failure to comply with the permit or other applicable zoning furnishes a ground to require the present owners of the project to operate on conditions other than those specified in the permit.

While there may be other cases where the failure to comply with a permit might justify regulations other than those provided for by

the permit, this is not such a case. First, the present owners are not the ones who failed to comply with the permit. Secondly, it does not appear that the failure to comply with the permit requirement of financing under section 231 and operation by a nonprofit corporation was of substantial importance in the light of subsequent events. The developer, a profit-making corporation, proceeded under section 221, and it defaulted. The provisions of section 221 and 231 are the same in most relevant respects except that section 221 is limited to moderate- and low-income housing while section 231 requires at least one-half of the units be designed for the elderly. Since the elderly can also rent section 221 housing, it does not appear how section 231 housing would have increased the number of tenants.[7] Similarly, it does not appear how a nonprofit operator could have been able to rent substantially more than one-third of the units and prevented default.[8]

The portion of the judgment enjoining plaintiffs from renting except to senior citizens on a nonprofit basis is reversed.

BROUSSARD, J.

WE CONCUR: MOSK, J.; REYNOSO, J.; GRODIN, J.; LUCAS, J.; *KAUS, J.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council

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[7] A 1978 survey showed that 72 percent of the units were occupied by persons 67 or older.

[8] There is no reason to assume that the initial rents at a project built under sections 221 and 231 will vary significantly if the project is owned by a nonprofit rather than a profit corporation.

So long as the builder is able to construct the project at or below the maximum allowed per unit, rents should not be substantially affected by the fact that the owner of the project is a profit-making organization rather than a nonprofit agency. The nonprofit owner may obtain a larger loan on the property, requiring larger principal and interest payments to amortize, and the difference should largely offset the profit on investment allowed the profit-making organization.

SPORTS ARENAS PROPERTIES, INC. v. CITY OF SAN DIEGO

L.A. 31987

CONCURRING AND DISSENTING OPINION BY BIRD, C.J.

I write separately to express my concern that the majority's result undermines the City of San Diego's legitimate efforts to provide affordable rental housing for the poor and elderly.

Although I agree with the majority's conclusion that the provisions of the conditional use permit are valid and binding upon successors-in-interest (see maj. opn., *ante*, at p. __ [typed opn. at p. 7]), I cannot agree that the violation of these terms does not justify the imposition of an injunction.

The majority posit that HUD's ability to protect its mortgage insurance funds would be seriously impaired if the limitations in the permit were deemed applicable to HUD and subsequent purchasers. That conclusion is somewhat surprising given the marked lack of evidence in the record to support it. The majority evade this problem by creatively holding that (1) HUD has the power to determine the restrictions to be placed on a property once HUD acquires it; (2) this power was implicitly authorized in the original permit; and (3) the conditions delineated in the permit are superfluous and, therefore, constitute "additional limitations" which equity deems unenforceable. (Maj. opn., *ante*, at pp. __-__ [typed opn. at pp. 12-13].)

Contrary to the majority's assertion, Title II of the National Housing Act (12 U.S.C.A. § 1713(l)) does *not* authorize HUD to ignore land use regulations propounded by the city in the name of ensuring a satisfactory return on insurance funds. (Maj. opn., *ante*, at p. __ [typed opn. at p. 12].) Moreover, even assuming that it did, there has not been an adequate showing that "HUD's

objective of protecting the financial interests" of the fund (maj. opn., *ante*, at p. __ [typed opn. at p. 12]) justifies the denial of safe and sanitary housing for the elderly and other vulnerable groups.

California faces an acute shortage of decent housing for its citizens. In 1980, the Legislature recognized this shortage as one of California's more pressing public concerns. It declared the attainment of a "suitable living environment for every California family" to be "a priority of the highest order." (Gov. Code, § 65580; see also Nash v. City of Santa Monica (1984) 37 Cal.3d 97.) While the private marketplace may meet the housing needs of those at higher income levels, the needs of other economic segments remain unfufilled.

I am concerned that the majority's interpretation of the relevant sections of the National Housing Act (12 U.S.C.A. §§ 1715v, 1713(l)) would enable the circumvention of the city's carefully drafted plan to ensure affordable housing for *all* of its citizens. In light of these concerns, I cannot join the opinion of my brethren.

BIRD, C.J.

Conditional Use Permit No. 4826

BE IT RESOLVED by the Council of the City of San Diego, as follows:

That Conditional Use Permit, Case No. 4826, requested by The Foundation for Specialized Group Housing to construct and operate a non-profit Senior Citizens Housing project located south of Governor Drive between Genesee Avenue and Boundary Freeway, in the R-1 zone, documented as No. 639744, May 31, 1962, in the office of the City Clerk, be, and the same is hereby approved subject to the following conditions:

1. That prior to the issuance of any building permits, complete building plans of the proposed senior citizens housing project (including signs) shall be submitted to the Planning Director for approval. Said plans shall be in substantial conformity with Exhibit 'A' on file in the Office of the Planning Department. The property shall be developed in accordance with the approved building plans except where regulations and this and/or other governmental agencies require deviation therefrom.

2. That prior to the issuance of any building permits, a complete landscaping plan, including a permanent watering system, shall be submitted to the Planning Director for approval. Approved planting shall be installed prior to occupancy of the subject property.

3. That prior to the issuance of any building permits, a final subdivision map covering the entire subject property shall be recorded, said map to include dedicated improved streets in lieu of the private roadways shown on Exhibit 'A'.

4. That not to exceed 550 apartment units shall be placed on the subject property in the approximate locations shown on Exhibit 'A'.

5. That prior to the occupancy of any building, not less than 602 parking spaces plus one parking space for every 300 square feet of gross floor area in the medical facilities building shall be provided; said parking spaces to be in either private garages or carports or in the parking areas shown on Exhibit 'A'. Each parking space in the designated parking areas shall be not less than 180 square feet in area, exclusive of aisle and driveway areas, and all off-street parking spaces shall be surfaced with not less than 2" A.C. or its equivalent, and each space shall be marked and provided with substantial stops.

6. That no vehicular parking shall be permitted at any time on any of the private driveways within this development.

7. That any floodlighting employed on the subject property shall be directed away from all adjoining property at all times.

8. That construction and operation of the proposed use shall comply at all times with the regulations and requirements of this and other governmental agencies.

BE IT FURTHER RESOLVED that the Council of the City of San Diego finds [the] following facts to be true:

1. That the proposed use at the particular location is necessary or desirable to provide a service or facility which will contribute to the general well-being of the neighborhood or the community.

2. That such use will not, under the circumstances of the particular case, be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity;

3. That the proposed use will comply with the regulations and conditions specified in the Code for such use; and

4. That the granting of this conditional use will not adversely affect the Master Plan of the City or the adopted plan of any governmental agency.

BE IT FURTHER RESOLVED by the Council of The City of San Diego, that the appeal of The Foundation For Specialized Group Housing is hereby SUSTAINED, and that the action taken by the Planning Commission on May 23, 1962, is hereby OVERRULED.

12 U.S.C. Section 1713(l)

Handling and disposal of property; settlement of claims

Notwithstanding any other provisions of law relating to the acquisition, handling, or disposal of real and other property by the United States, the Secretary shall also have power, for the protection of the interests of the General Insurance Fund, to pay out of the General Insurance Fund all expenses or charges in connection with, and to deal with, complete, reconstruct, rent, renovate, modernize, insure, make contracts for the management of, or establish suitable agencies for the management of, or sell for cash or credit or lease in his discretion, any property acquired by him under this section; and notwithstanding any other provision of law, the Secretary shall also have power to pursue to final collection by way of compromise or otherwise all claims assigned and transferred to him in connection with the assignment, transfer, and delivery provided for in this section, and at any time, upon default, to foreclose on any property secured by a mortgage assigned and transferred to or held by him: Provided, that section 5 of Title 41 shall not be construed to apply to any contract for hazard insurance, or to any purchase or contract for services or supplies on account of such property if the amount thereof does not exceed $1,000.

12 U.S.C. Section 1715l

Housing for moderate income and displaced families

Purpose

(a) This section is designed to assist private industry in providing housing for low and moderate income families and displaced families.

(d) Eligibility for insurance; conditions; limits

To be eligible for insurance under this section, a mortgage shall--

(1) have been made to and be held by a mortgagee approved by the Secretary as responsible and able to service the mortgage properly;

(2) be secured by property upon which there is located a dwelling conforming to applicable standards prescribed by the Secretary under subsection (f) of this section, and meeting the requirements of all State laws, or local ordinances or regulations, relating to the public health or safety, zoning, or otherwise, which may be applicable thereto . . .

12 U.S.C. Section 1715v.

Insurance of mortgages for housing for elderly persons

Purpose; definitions

(a) The purpose of this section is to assist in relieving the shortage of housing for elderly persons and to increase the supply of rental housing for elderly persons.

For the purposes of this section--

(1) the term "housing" means eight or more new or rehabilitated living units, not less than 50 per centum of which are specially designed for the use and occupancy of elderly persons;

(2) the term "elderly person" means any person, married or single, who is sixty-two years of age or over; and

(3) the terms "mortgage", "mortgagee", "mortgagor", and "maturity date" shall have the meanings respectively set forth in section 1713 of this title.

24 C.F.R. Section 221.545 Development of property.

(a) Obligation of mortgagor. The mortgagor shall be obligated to develop the property as follows:

(1) A mortgagor, other than a rehabilitation sales mortgagor meeting the requirements of § 221.510(a)(3), shall be obligated to either construct and complete new housing accommodations on the mortgaged property or rehabilitate existing housing accommodations designed principally for residential use.

(2) A rehabilitation sales mortgagor meeting the requirements of § 221.510(a)(3) shall be obligated to purchase and rehabilitate existing housing.

(b) Minimum number of units. (1) A project, other than a project to be rehabilitated by a rehabilitation sales mortgagor meeting the requirements of § 221.510(a)(3), shall consist of not less than five dwelling units and may be detached, semidetached, or row houses, or multifamily structures.

(2) A project, where the mortgagor is a rehabilitation sales mortgagor meeting the requirements of § 221.510(a)(3), shall consist of not less than four single family dwellings or four one-family units in a condominium. The single family dwellings may be detached, semidetached, or row houses. The family units shall be located in a structure or structures concerning which the mortgagor certifies that it intends, upon completion of the project, to commit the ownership of the project to a plan of apartment ownership approved by the Commissioner.

(c) Compliance with governmental regulations. The property, including improvements, shall comply with any material zoning or deed restrictions applicable to the project site and with all applicable building and other governmental regulations.

24 C.F.R. Section 231.10 Development of property.

(a) Commercial and special facilities. The project may include such commercial and special facilities as the Commissioner deems adequate to serve the occupants of the project.

(b) Zoning, deed or building restrictions. The project when constructed or rehabilitated shall not violate any material zoning or deed restrictions applicable to the project site, and shall comply with all applicable building and other governmental requirements.

24 C.F.R. Section 290.20 Disposition objectives.

The disposition of HUD-owned multifamily housing projects shall be carried out in accordance with the objectives listed below.

(a) Reduce the inventory of HUD-owned projects in a timely manner consistent with the goals of:

(1) Preserving or increasing the number of housing units available to and affordable by lower income tenants;

(2) Maintaining the existing housing stock in decent, safe and sanitary condition; and

(3) Preserving and revitalizing urban residential neighborhoods.

(b) Consistent with meeting the above goals, to obtain a sale price based on the projects' present market value and anticipated future use or condition sufficient to protect the financial interests of the government and to produce a satisfactory return to the mortgage insurance funds.

(c) To dispose of projects in a manner which is consistent with HUD approved housing and community development needs, plans and actions of local governments to the extent feasible.

(d) To dispose of all projects in a manner which minimizes the displacement of tenants.

(e) To demolish projects only as a last resort.

(f) These are national objectives and, while local circumstances may make it impossible to meet all the objectives, they should be met to the greatest extent feasible. In some cases the objectives may represent conflicting public policy goals and decisions will have to be made to balance and choose among various objectives. In these cases discretion and judgment will have to be exercised in designing a program which best meets the national goals of providing affordable housing and preserving and revitalizing neighborhoods.

U.S. Constitution

Article VI, Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws any State to the Contrary notwithstanding.

Supreme Court, U.S.
FILED
APR 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1599

In The
Supreme Court of the United States
October Term, 1985

CITY OF SAN DIEGO, et al.,

Petitioners,

vs.

SPORTS ARENAS PROPERTIES, INC., et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of California

RESPONDENTS' BRIEF IN OPPOSITION

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April 30, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

48 pp

QUESTIONS PRESENTED

This petition does not present any federal questions.

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The Respondents, SPORTS ARENAS PROPERTIES, INC., KOPLER ENTERPRISES, INC., and CHASE HOTELS, INC.[1] respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the California Supreme Court in this matter, decided December 31, 1985. That opinion is reported at 40 Cal.3d 808.

—o—

STATEMENT OF FACTS

University City Village ("UCV") is an apartment complex consisting of 542 units located on 76 acres in an affluent section of San Diego, California. Its amenities include a swimming pool, recreation center, generous landscaped areas, and an adjoining nine-hole golf course. It was constructed in 1962-63 pursuant to a Conditional Use Permit ("CUP") issued in 1962. The Conditional Use Permit is appended hereto as Appendix "A."

The CUP was obtained by an organization known as The Foundation for Specialized Group Housing. That Foundation did not own the land subject to the CUP. Instead, in its application for the CUP, it stated that it had a contract to acquire the land; that it intended to oper-

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[1] Respondents, and their parent, subsidiary, and affiliate corporations are as follows: Sports Arenas Properties, Inc.; Sports Arenas, Inc.; Bradley Lanes, Inc.; Cabrillo Lanes, Inc.; Marietta Lanes, Inc.; Downtown Properties, Inc.; Chase Hotels, Inc. now known as Kopler Properties, Inc.; Kopler Enterprises, Inc.; Four Seasons Lakeside, Inc.; Chase Resorts, Inc.; Resortair, Inc.; Kopler Communications, Inc.; Kopler Communications of California, Inc.

ate the proposed apartment complex under the requirements of the Federal Housing Act, Title II, Section 231, 12 U.S.C.A. Section 12715v; that it would be operated by a qualified non-profit organization; and that occupancy would be restricted to senior citizens.

The Foundation never acquired the property. University City Village was, instead, constructed by a private developer with private financing insured under Section 221 of Title II of the Federal Housing Act, 12 U.S.C.A. Section 1715*l*. In 1966, the developer defaulted on the loan and the Department of Housing and Urban Development ("HUD") acquired the project in accordance with its insurance agreement with the private lender.

HUD operated the project from 1966 to 1968. Under HUD operation, the project was rented to persons 21 years of age or older. There was no restriction to "senior citizens."

In 1968, Respondents, and Respondents' predecessors in interest, purchased UCV from HUD. The property was purchased with neither actual nor constructive notice of the terms, nor indeed the existence, of the CUP. HUD did not restrict the property to non-profit senior-citizen operation. Instead, the regulatory agreement for the operation of the property entered into between HUD and Respondents allowed Respondents to make a profit on their operation.

From 1968 through 1979, UCV was operated on a for-profit basis without restriction to senior-citizen occupants.

In 1979, Respondents applied to the City of San Diego to convert its apartments to condominiums. Although the City had never before asserted that UCV was restricted to non-profit senior-citizen operation, it denied the request

because conversion to condominiums would be inconsistent with the purported restrictions of the CUP.

Respondents filed suit to overturn that decision.[2] Petitioner, City of San Diego, cross-complained, seeking an injunction requiring that the property be operated only on a non-profit basis and rented only to senior citizens. The University City Village Tenants Association, and Gertrude Evans, a tenant therein, intervened on behalf of Petitioner.

The trial court determined that the CUP restricted the property to non-profit operation and senior-citizen occupation. The court defined "senior citizens" to be persons over the age of 55 years.

Respondents appealed the decision to the California District Court of Appeal for the Fourth Appellate District.

The District Court of Appeal determined that the CUP was vague, uncertain, and ambiguous; that it did not restrict the property as contended by Petitioner; and that Respondents, as bona fide purchasers for value without notice of the unrecorded CUP, purchased the property from HUD free of any restrictions. (Appendix "B")

Intervenors petitioned the California Supreme Court to review the decision of the District Court of Appeal. Petitioner joined in that Petition. The California Supreme Court granted the Petition for Hearing. In the proceedings before the California Supreme Court, the Cali-

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[2] Respondents have since abandoned their plan for condominium conversion, and that issue has been removed from the case.

fornia Coastal Commission and 33 California cities, including the cities of Berkeley, San Francisco, and Los Angeles, appeared as amici curiae.

It was the position of these amici curiae that the decision of the District Court of Appeal would disrupt land planning in California. They were particularly concerned with the effect of holding that CUPs were subject to the recording laws. In support of the instant CUP, they contended that the necessary terms could be implied, and ambiguity eliminated by incorporating into the CUP the statements made in the application made for it. It is only in this application that reference is made to the Federal Housing Act, Title II, Section 231, and states that the project would be operated by a qualified non-profit organization with occupancy restricted to senior citizens who qualify. Additionally the amici curiae contended that it was unnecessary to record a CUP in order to bind subsequent purchasers of the property.

On December 31, 1985, the California Supreme Court rendered its decision in the case. That opinion (Appendix "C"), in apparent deference to the position of amici curiae, decided that: (1) by reference to the application for the CUP, the terms of it are clear and certain [Appendix C-7, 8]; (2) that the CUP incorporates within itself the provisions of Section 231 of the Federal Housing Act [Appendix C-10]; (3) that by virtue of this incorporation of Section 231, the CUP, itself, did not prohibit transfer of the property by HUD to a third party free and clear of any restrictions [Appendix C-11]; (4) that HUD transferred the property to Respondents free of any restrictions [Appendix C-11, 12]; and (5) that equitable consid-

erations did not favor reimposing the conditions on the property today [Appendix C-12].

The court did not find it necessary to reach the issue of the application of the California recording statutes to a conditional use permit and whether a bona fide purchaser for value without notice of a CUP would take free of any restrictions contained therein. Neither did the court determine that the CUP was pre-empted by the Federal Housing Act, or any other provision of federal law.

———o———

REASONS WHY THE PETITION SHOULD BE DENIED

1. *Neither the decision below nor the record raises a federal question.*

In its attempt to present a federal question to this court, Petitioner characterizes the opinion of the California Supreme Court as holding that the CUP in question was pre-empted by the Federal Housing Act and HUD regulations. Such characterization is not accurate.

The pertinent portions of the California Supreme Court decision are as follows:

> "The permit did not restrict the use of the property to nonprofit senior citizen housing in the event that HUD was required to take over the project under its guarantee. When HUD took over the property, it was not under a duty to sell to profit-making organizations, and it was not under a duty to limit the use of the property to senior citizens or moderate-or low-income tenants.

"The permit, as we have seen, incorporates the provisions of section 231. Thus it incorporates the part of the section expressly incorporating the provisions of 12 United States Code Annotated section 1713(1). (12 U.S.C.A. Section 1715v(e); see also 12 U.S.C.A. Section 1715*l*(g).) The term 'non-profit Senior Citizens Housing Project' in the permit used to describe the project described in the application may not reasonably be interpreted to incorporate the provisions of section 231 and at the same time to exclude some of the provisions of the section. Under section 1713 (1) HUD is authorized to sell property acquired for cash or credit in its discretion for the protection of the insurance fund. While local concerns and the purposes for which the project was built are factors to be considered along with HUD's objective of protecting the financial interests of the government and producing a satisfactory return to the mortgage insurance funds. (24 C.F.R. Section 290.20.) Obviously, limitation of sale to a nonprofit agency could seriously impair HUD's ability to protect the insurance funds. Since the permit provisions for nonprofit senior citizen housing contemplated sale to a profit-making organization by HUD upon such limitations as it found proper, the trial court could not properly impose additional limitations on the basis of the provision.

"Because the conditional use permit authorized a section 231 project, HUD, once it acquired the property under its guarantee, had the power to determine to whom it would sell and the restrictions to be placed on the purchaser. It does not appear that plaintiffs are in violation of any HUD restrictions." [Appendix C-10-12]

The California Supreme Court held only that the provisions of the Federal Housing Act which were incorporated into that particular CUP allowed HUD to sell the property to Respondents free of any conditions. It did not hold that any other CUP, which did not incorporate

the Federal Housing Act, would be in any way affected by the Act or the regulations of HUD.

The court did not mention the term "pre-emption."

The court did not cite any case or Constitutional provision remotely touching on pre-emption.

The court did not decide that the CUP, or any other instrument of local land regulation, is in any manner affected by federal law.

This case simply does not present a federal question.

2. *Granting the Petition may result in the very disruption of local land use controls which Petitioner professes to seek to avoid.*

In the proceedings below, there were two major sets of issues in connection with the CUP. The first dealt with the construction of the CUP; the second with the effect of the California recording statutes on the continued validity of the CUP in light of the fact that it had not been recorded and Respondents purchased the property without actual notice of it.

The District Court of Appeal determined both sets of issues in Respondents' favor. With respect to construction of the CUP, it determined that it was vague and ambiguous, and did not, by its terms, restrict the subject property in the manner contended by Petitioner. With respect to the recording statutes, it determined that the recording statutes applied to a CUP, and that Respondents, as bona fide purchasers without notice, took free of any restrictions of the CUP.

The decision of the District Court of Appeal created somewhat of a furor among California land planning agen-

cies. It prompted 33 cities and the California Coastal Commission to appear as amici curiae to urge that the decision of the District Court of Appeal was in error, and would result in tremendous disruption of California land planning. The contentions of these amici curiae are set out in the Statement of Facts hereto.

By deciding the issues relating to the construction of the CUP in the manner in which it did, the California Supreme Court was able to reach an equitable result, while at the same time satisfying the concerns of the amici curiae and severely limiting the case to its facts. The decision also allowed the Supreme Court to avoid deciding the recording statute issues.

If this Court grants the Petition, and ultimately decides the case in the manner sought by Petitioner, the result may be to place the recording statute issue back before the California Supreme Court in a posture where it must decide the issue, as did the District Court of Appeal, in Respondents' favor.

In the long run it may be best, for Petitioner and the other cities in California, to leave well enough alone.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

DATED: April 30, 1986

Respectfully submitted,

BRUCE A. RAY
Attorney for Respondents

APPENDIX "A"

Conditional Use Permit No. 4826

BE IT RESOLVED by the Council of the City of San Diego, as follows:

That Conditional Use Permit, Case No. 4826, requested by The Foundation for Specialized Group Housing to construct and operate a non-profit Senior Citizens Housing project located south of Governor Drive between Genesee Avenue and Boundary Freeway, in the R-1 zone, documented as No. 639744, May 31, 1962, in the office of the City Clerk, be, and the same is hereby approved subject to the following conditions:

1. That prior to the issuance of any building permits, complete building plans of the proposed senior citizens housing project (including signs) shall be submitted to the Planning Director for approval. Said plans shall be in substantial conformity with Exhibit 'A' on file in the Office of the Planning Department. The property shall be developed in accordance with the approved building plans except where regulations and this and/or other governmental agencies require deviation therefrom.

2. That prior to the issuance of any building permits, a complete landscaping plan, including a permanent watering system, shall be submitted to the Planning Director for approval. Approved planting shall be installed prior to occupancy of the subject property.

3. That prior to the issuance of any building permits, a final subdivision map covering the entire subject property shall be recorded, said map to include dedicated improved streets in lieu of the private roadways shown on Exhibit 'A'.

4. That not to exceed 550 apartment units shall be placed on the subject property in the approximate locations shown on Exhibit 'A'.

5. That prior to the occupancy of any building, not less than 602 parking spaces plus one parking space for every 300 square feet of gross floor area in the medical facilities building shall be provided; said parking spaces to be in either private garages or carports or in the parking areas shown on Exhibit 'A'. Each parking space in the designated parking areas shall be not less than 180 square feet in area, exclusive of aisle and driveway areas, and all off-street parking spaces shall be surfaced with not less than 2'' A.C. or its equivalent, and each space shall be marked and provided with substantial stops.

6. That no vehicular parking shall be permitted at any time on any of the private driveways within this development.

7. That any floodlighting employed on the subject property shall be directed away from all adjoining property at all times.

8. That construction and operation of the proposed use shall comply at all times with the regulations and requirements of this and other governmental agencies.

BE IT FURTHER RESOLVED that the Council of the City of San Diego finds [the] following facts to be true:

1. That the proposed use at the particular location is necessary or desirable to provide a service or facility which will contribute to the general well-being of the neighborhood or the community.

2. That such use will not, under the circumstances of the particular case, be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity:

3. That the proposed use will comply with the regulations and conditions specified in the Code for such use; and

4. That the granting of this conditional use will not adversely affect the Master Plan of the City or the adopted plan of any governmental agency.

BE IT FURTHER RESOLVED by the Council of the City of San Diego, that the appeal of The Foundation For Specialized Group Housing is hereby SUSTAINED, and that the action taken by the Planning Commission on May 23, 1962, is hereby OVERRULED.

APPENDIX "B"

CERTIFIED FOR PUBLICATION

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

D 000669
4 Civ. No. 28484

(Super. Ct. Nos. 448425 and 456802

SPORTS ARENAS PROPERTIES, INC., et al.,
Plaintiffs and Appellants,

v.

CITY OF SAN DIEGO, et al.,
Defendants and Respondents.

UNIVERSITY CITY VILLAGE TENANTS ASSOCIATION, et al.,
Intervenors and Respondents.

(Filed June 27, 1984)

APPEAL from judgments of the Superior Court of San Diego County, Daniel C. Leedy, Judge. Reversed and remanded with instructions. Injunction vacated and set aside.

Bruce A. Ray and Baxley, Mautino & Ray, for Plaintiffs and Appellants.

John W. Witt, City Attorney, Ronald L. Johnson, Senior Chief Deputy, C. Alan Sumption, Chief Deputy,

Nina B. Deane and Celeste Stahl Brady, Deputies, for Defendants and Respondents.

D. Dwight Worden and W. Scott Williams for Intervenors and Respondents.

This appeal concerns the rights of owners of a rental housing project (the project) constructed under a conditional use permit to convert the rental units to condominiums. The issues presented include the nature of the conditional use permit, its effect on successors in interest applicability and constitutionality of San Diego's condominium conversion ordinance and validity of an injunction reverting the project to a non-profit basis and fixing 55 years old as the age requirement of at least one occupant of a rental unit. We hold the ordinance as applied inapplicable in the circumstances presented, the injunction overboard and reverse.

On March 17, 1962, the Foundation for Specialized Group Housing applied to the City of San Diego for a conditional use permit: "to construct and operate a non-profit senior citizen housing project under the requirements specified in the Federal Housing Act, Title II, Section 231. The project will consist of 549 apartment units in 78 buildings providing beautiful and adequate community facilities. The project will be operated by a qualified non-profit organization, The Foundation for Specialized Group Housing. Occupancy is restricted to senior citizens who qualify."

At the time the application was filed, the City owned the property on which the project was to be constructed. On April 17 1962, a month after the Foundation applied for the permit, the City conveyed the property to Univer-

sity City, Inc., a corporation organized for profit. San Diego issued the conditional use permit on June 28, 1962.[1]

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[1]The conditional use permit is set out here:

"BE IT RESOLVED by the Council of the City of San Diego, as follows:

"That Conditional Use Permit, Case No. 4826, requested by The Foundation for Specialized Group Housing to construct and operate a non-profit Senior Citizens Housing project located south of Governor Drive between Genesee Avenue and Boundary Freeway, in the R-1 zone, documented as No. 639744, May 31, 1962, in the office of the City Clerk, be, and the same is hereby approved subject to the following conditions:

"1. That prior to the issuance of any building permits, complete building plans of the proposed senior citizens housing project (including signs) shall be submitted to the Planning Director for approval. Said plans shall be in substantial conformity with Exhibit 'A' on file in the Office of the Planning Department. The property shall be developed in accordance with the approved building plans except where regulations and this and/or other governmental agencies require deviation therefrom.

"2. That prior to the issuance of any building permits, a complete landscaping plan, including a permanent watering system, shall be submitted to the Planning Director for approval. Approved planting shall be installed prior to occupancy of the subject property.

"3. That prior to the issuance of any building permits, a final subdivision map covering the entire subject property shall be recorded, said map to include dedicated improved streets in lieu of the private roadways shown on Exhibit 'A'.

"4. That not to exceed 550 apartment units shall be placed on the subject property in the approximate locations shown on Exhibit 'A'.

"5. That prior to the occupancy of any building, not less than 602 parking spaces plus one parking space

(Continued on following page)

The permit was never recorded in the County Recorder's office.

(Continued from previous page)

for every 300 square feet of gross floor area in the medical facilities building shall be provided; said parking spaces to be in either private garages or carports or in the parking areas shown on Exhibit 'A'. Each parking space in the designated parking areas shall be not less than 180 square feet in area, exclusive of aisle and driveway areas, and all off-street parking spaces shall be surfaced with not less than 2" A.C. or its equivalent, and each space shall be marked and provided with substantial stops.

"6. That no vehicular parking shall be permitted at any time on any of the private driveways within this development.

"7. That any floodlighting employed on the subject property shall be directed away from all adjoining property at all times.

"8. That construction and operation of the proposed use shall comply at all times with the regulations and requirements of this and other governmental agencies. "BE IT FURTHER RESOLVED that the Council of the City of San Diego finds [the] following facts to be true:

"1. That the proposed use at the particular location is necessary or desirable to provide a service or facility which will contribute to the general well-being of the neighborhood or the community.

"2. That such use will not, under the circumstances of the particular case, be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity;

"3. That the proposed use will comply with the regulations and conditions specified in the Code for such use; and

"4. That the granting of this conditional use will not adversely affect the Master Plan of the City or the adopted plan of any governmental agency.

(Continued on following page)

The Foundation did not acquire the property or construct the project and has long since disappeared. University City, Inc., the for-profit corporation, retained title and in 1963, acting on its own without the Foundation being involved, substituted a revised plot plan for the project reducing the number of units, deleting a medical facility and eliminating references to federally insured financing for elderly citizen housing. The revision to the conditional use permit was approved by the City. No mention was made of the Foundation in the City's approval of the revision.

Title to the property then passed to and through various for-profit corporations coming to rest in University City Leisure Life Village, a for-profit corporation. That corporation then constructed the project with private financing insured under provisions of the National Housing Act, title II, section 221, subdivision (d)(4),[2] low and moderate income housing, instead of elderly housing provisions of section 231, as set out in the conditional use permit application. The project was operated for profit and tenants initially were limited to those 50 years of age or older.

In 1965, the owner of the project defaulted on the federally insured financing, the lender foreclosed, and the

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(Continued from previous page)

"BE IT FURTHER RESOLVED by the Council of The City of San Diego, that the appeal of The Foundation For Specialized Group Housing is hereby SUSTAINED, and that the action taken by the Planning Commission on May 23, 1962, is hereby OVERRULED."

[2]National Housing Act (1934) Public Law 73-479 as added by Housing Act of 1954, Public Law 83-560.

Department of Housing and Urban Development (HUD) acquired and operated the project renting to persons 21 years of age or older until 1968. HUD then sold the project to Penasquitos, Inc., and 220 North Kingshighway, Inc. (now Koplar Enterprises, Inc., an appellant here), both for-profit corporations, who earlier had agreed between themselves to acquire and operate the project as a joint venture for profit.

In 1974, appellant Sports Arenas Properties, Inc. acquired Penasquitos' interest and appellant Chase Hotels, Inc., a subsidiary of Koplar, acquired an interest in the joint venture in 1978. Koplar, Sports Arenas and Chase Hotels are corporations organized for profit and are now as joint venturers the owners of the project and will be so referred to collectively in this opinion. At all times, the project was assessed and taxed as a for-profit entity.

II

In June of 1979, the Owners filed an application for a tentative subdivision map with the City to convert the project from rental apartments to condominium units. The application was denied by the City Council.

On September 10, 1979, the City enacted its condominium conversion ordinance (San Diego Mun. Code, §§ 101.0990-101.0999) and in February 1980, the Owners applied for a condominium conversion permit under the new ordinance and reapplied for a subdivision map. The City denied the subdivision map application as being inconsistent with single family zoning, the provisions of the conditional use permit and the condominium conversion ordinance. The condominium conversion permit was de-

nied on the grounds the project was a "public interest project" having been developed to provide for elderly rental housing and the Owners failed to make provisions to perpetuate the use of the project for elderly rental housing.[3]

The Owners filed petitions for writs of mandate and for declaratory relief as to the 1979 and the 1980 applications and denials. University City Village Tenants Association and Gertrude Evans, a tenant, intervened in both cases (collectively the "Tenants"). San Diego cross-complained against the Owners seeking an injunction to require the Owners to operate the project on a non-profit basis and to rent only to "senior citizens." The cases were consolidated for trial.

The court upheld the condominium conversion ordinance, denied the writs of mandate and ordered the Owners to operate the project on a non-profit basis (gross oper-

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[3]The applicable San Diego Municipal Code section reads as follows:

> "SEC. 101.0992.2 PUBLIC INTEREST PROJECT
>
> "An application for a condominium conversion map for a residential project that was financed by funds obtained from a governmental agency to provide for elderly, handicapped, disabled or low-income housing shall not be considered for a condominium conversion map.
>
> "An application for a condominium conversion map for a residential project that was developed to provide for elderly, handicapped, disabled, or low-income rental housing shall not be considered for a condominium conversion map unless provisions are made to perpetuate the use for which the project was developed. Such provisions shall be made a part of the conditions of approval on the condominium conversion map."

ating income not to exceed reasonable operating expenses) and to rent apartment units to tenants one of whom must be at least 55 years old.

This appeal by the Owners ensued.

III

We state applicable standards of appellate review. The petitions for writ of mandate ask for review of City actions in denying the tentative subdivision maps and the application for a condominium conversion permit. The parties agree the petitions sound in administrative mandamus under Code of Civil Procedure section 1094.5. On appeal, we are governed by the rules applicable to the trial court: whether the City acted without or in excess of its jurisdiction, whether there was a fair trial, whether there was a prejudicial abuse of discretion (Code Civ. Proc., § 1094.5, subd. (b)). A prejudicial abuse of discretion is committed if the City failed to proceed in the manner required by law, if the decision is not supported by the findings or if the findings are not supported by the evidence (Code Civ. Proc., § 1094.5, subd. (b)).

In determining whether the findings are supported by the evidence, a reviewing court applies either the "independent judgment" test or the "substantial evidence" test. If the "substantial evidence" test applies, the role of the court is to determine whether the findings are supported by substantial evidence in light of the whole record. (*Topanga Assn. For A Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 510; Code Civ. Proc., § 1094.5, subd. (c)).

The "independent judgment" test applies only if a fundamental vested right is involved, and "[c]ases involving abuse of discretion charges in the area of land use regulation do not involve fundamental vested rights." (*PMI Mortgage Ins. Co. v. City of Pacific Grove* (1981) 128 Cal. App.3d 724, 729.) The exception is where a property owner has performed substantial work and incurred substantial liabilities in good faith reliance on a building permit or on all necessary project approvals. (*PMI Mortgage Ins. Co. v. City of Pacific Grove, supra; Billings v. California Coastal Com.* (1980) 103 Cal.App.3d 729, 735-736.)

The Owners have never obtained any approvals for their condominium conversion project. They have no fundamental vested rights at stake to provide a basis for applying the independent judgment test, even assuming they have incurred expenses in the application process. (*Santa Monica Pines, Ltd. v. Rent Control Board* (1984) 35 Cal.3d 858, 865-866). Absent good faith reliance on a building permit or final discretionary project approval, expenditures alone do not provide a basis for a vested rights claim. (*Marina Plaza v. California Coastal Zone Conservation Com.* (1977) 73 Cal.App.3d 311, 325-326; *Avco Community Developers Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 793.) The "substantial evidence" test applies to a review of the mandamus judgment here.

IV

The Owners' 1979 effort to convert the project to condominiums through the filing of a subdivision map was rejected by the City on findings the subdivision map was inconsistent with the R-1, single-family zoning, city de-

velopment regulations and the provisions of the conditional use permit. The City denied the 1980 subdivision map on the same basis and denied the permit to convert under the ordinance, finding the project was developed to provide elderly rental housing, was thus a public interest project and no provisions were made to perpetuate the use for which the project was developed. We consider the issues presented on this appeal as to denial of the filing of the subdivision maps applicable to both cases (San Diego Superior Court Case Nos. 448425 and 456802). Issues as to denial of the condominium conversion permit relate to Case No. 456802. Consistent with the position of the parties on this appeal, we do not differentiate further between the two cases and treat them in our discussion as one.

V

We first address the conditional use permit and the status of the project as a "public interest project" requiring a perpetuation of use as elderly housing to qualify for a condominium conversion permit.

We refresh the reader's memory. The conditional use permit recites in its preamble issuance of a permit ". . . requested by the Foundation for Specialized Group Housing to construct and operate a non-profit Senior Citizens Housing Project . . ." as documented in the application. The phrase "senior citizens housing project" appears once again in paragraph 1 concerning need to submit the building plans to the City's Planning Director for approval. The phrase is not used elsewhere in the permit.

The conditional use permit does not set forth as conditions any requirement the project be operated to provide

rental housing by a non-profit entity for elderly persons and does not define non-profit,[4] senior citizen[5] or housing project. The application speaks in generalities and does not document or define or explicate the proposed uses. The Foundation is not identified as a non-profit corporation, entity, association or otherwise.

California legislation enacted since 1962 uses various phrases in reference to older persons. The California Interdepartmental Committee on Aging provides services and programs for "older Californians" (Welf. & Inst. Code, §§ 9340-9353) and area agency aging advisory councils are

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[4]The National Housing Act (Tit. 12, U.S.C.A., ch. 13, §§ 1701-1750g) refers to public or non-profit private agencies. "The term 'corporation' means any incorporated private institution or foundation [¶] (A) no part of the net earnings of which inures to the benefit of any member, founder, contributor, or individual; [¶] (B) which has a governing board (i) the membership of which is selected in a manner to assure that there is significant representation of the views of the community in which such project is located and (ii) which is responsible for the operation of the housing project assisted under this section; and [¶] (C) which is approved by the Secretary as to financial responsibility. (§ 1701q, subd. (d)(2).)

Non-profit activities, non-profit associations, non-profit charitable organizations, non-profit community organizations, non-profit cooperative associations, non-profit corporations, non-profit organizations, non-profit property owners' associations and other non-profit agencies found in our codes suggest myriad forms of such activities and include specific definitions (see West's Ann. Cal. Codes, Gen. Index, MO to Q, West Pub. Co. (1981)).

[5]The phrase "senior citizen" did not have a legal or dictionary definition in 1962. The National Housing Act, *supra*, as of 1962, defined elderly persons as 62 years of age or older (§ 1701q, subd. (d)(4); § 1715L, subd. (f); § 1715v, subd. (a)(2)). The Slum Clearance, Urban Renewal and Farm Act defined elderly persons as 62 years of age or older (tit. 42, ch. 8A, § 1471). The Social Security Act defines an aged individual as 65 years or older (tit. 42, U.S.C.A., ch. 7, Social Security, §§ 1382, 1395c).

concerned with "older persons" (Welf. & Inst. Code, §§ 9360-9365). The Elder Abuse Reporting Act refers to an "elder" as a person 65 years of age or older (Welf. & Inst. Code, §§ 9380-9386). In 1977, the phrase "senior citizen" first appears in the Multipurpose Senior Citizens Project legislation in defining a "senior citizen" as a person 65 years of age or older (Welf. & Inst. Code, §§ 9400-9413) and in 1983 the Multipurpose Senior Services Program provided for persons aged 65 or older (Welf. & Inst. Code, §§ 9400-9409). The Senior Companions Program defines adults 60 years of age or older as "senior companions" (Welf. & Inst. Code, §§ 9520-9527) and the Foster Grandparent Program refers to those participating as being 60 years or older (Welf. & Inst. Code, §§ 9540-9544). The California Community Crime Resistance Program defines an "elderly or senior citizen" as an individual 55 years of age or older (Pen. Code, § 13841, subd. (b)). A claimant under the Senior Citizens Homeowners and Renters Property Tax Assistance Law is an individual 62 years of age or older (Rev. & Tax. Code, § 20505) who owns or rents a residence. The California Commission on Aging acts on behalf of "older persons" (Welf. & Inst. Code, § 9201).

We conclude the conditional use permit is vague, uncertain and ambiguous and on its face is not susceptible to the interpretation given by the City and the Tenants, i.e., the project was developed to provide for elderly rental housing and thus is a public interest project under the condominium conversion ordinance. We examine the conduct of the parties as an aid to interpretation of the conditional use permit.

We have reviewed the administrative record of the 1979 and 1980 proceedings before the Planning Commission and the City Council. We find allusions in presentations by the Owners the project initially was intended for rentals to persons aged 50 years or older and was so operated for about a year. While not so intended, the default and subsequent foreclosure suggests the operation was indeed operated on a non-profit basis. During HUD's ownership, the project was rented to persons aged 21 years or older. Following the HUD sale in 1968 to 1980, the administrative record does not include any evidence the project was operated for elderly rental housing. At the trial, results of a 1978 survey of project occupancy suggest one and two-person households totaled 96%, retired persons totaled 72% and persons aged 50 to 64 were 22%, 67 to 70 were 26% and 70 and over totaled 46%. A 1980 update shows an increase in occupancy by younger people.

As we have seen, the project was never owned by a non-profit entity or operated on a non-profit basis except during HUD's three years of ownership and operation. The City's approval of the 1963 amendment to the conditional use permit evidenced city acquiescence in the for-profit ownership and operation of the project.

The conditional use permit does not mandate the project be owned or operated on a non-profit basis or by a non-profit entity and does not require tenancy be limited to any particular age group. The conduct of the parties is consistent with that interpretation of the conditional use permit.

VI

Our views are fortified by an analysis of the effect of the conditional use permit on the appellants here, who are successors in interest to University City, Inc., the for-profit corporation that constructed and initially operated the project.

A

A conditional use permit allows a particular use not permitted under a zoning ordinance if that use promotes the public welfare and does not impair the character of the zoned area (5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 484, p. 3783). Conditional use permits allow a usage in a zoning pattern considered by the City to be desirable to the community but which, by their nature, such as noise, traffic or size, militate against their existence in every location within a zone or in any location without restrictions tailored to fit the special problems which the use presents (8 Cal. Real Estate Law & Practice, Zoning and Land Use Control, § 265.50, Hagman and Volpert, Matthew Bender (1984)).

In 1962, San Diego's zoning ordinances did not provide for conditional use permits for elderly housing. Such usage was authorized if applied for and carried on by non-profit entities. Conditional use permits for housing for the elderly may now be issued in any residential zone (San Diego Mun. Code, § 101.0506).

B

The enforcement of conditional use permits has received little attention in the cases.[6] The question arises in contexts requiring determination as to entitlement of benefits and assumption of burdens under the permits.

Acceptance of a conditional use permit and use of benefits afforded thereunder carries the burden of limitation on use on a theory of promissory estoppel (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 511; *Edmonds v. County of Los Angeles* (1953) 40 Cal.2d 642, 651). *County of Imperial v. McDougal, supra,* as an alter-

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[6]We note with interest San Diego's past and present practice as to policing the use of property under a conditional use permit. A senior planner testified at the Planning Commission hearing on the condominium conversion permit:

> "MR. KLEIN: Maybe if I can help, since I was here in 1962 when this particular project was approved. At that time we did not have a conditional use permit procedure for housing for the elderly. We did not have the PRD vehicle available. In order to qualify for a conditional use permit it had to be an application of a non-profit organization. Otherwise, there could not have been any application made. Therefore, the application was for the non-profit group and to operate it as a non-profit organization. And the housing for the elderly was included in that request, but we did not have a lot of the criteria or anything we have today with respect to housing-for-the-elderly projects. I think this was the only one that was granted under the non-profit conditional use permit. As far as compliance is concerned in those days, as today, conditional use permits were reviewed on a complaint basis and we never were advised or never became aware that this particular project was apparently not being operated as a non-profit organization because we never received any complaints on it. And, therefore, again, we would enforce this in terms of a complaint situation."

native ground for holding a successor in interest enjoying the benefits was bound by the conditions of a permit, observed conditional use permits " . . . run with the land" (*Id.*, at p. 510) and cited *Cohn v. County Board of Supervisors* (1955) 135 Cal.App.2d 180, 184, as authority for that proposition. There, the owner of land succeeded to the uses authorized by a conditional use permit secured by lessees who dropped plans to develop a project authorized by the permit. Responding to the contention the permit was personal to the applicants, the court noted without discussion "special use permits under zoning ordinances run with the land." (*Id.*, at p. 184.)

Without discussion of implications of the creation of estates in real property by issuance of conditional use permits, commentators have cited *Cohn* and *McDougal* as authority for the proposition conditional use permits "run with the land." (8 Cal. Real Estate Law & Practice, *supra*, § 265.50; 5 Witkin, Summary of Cal. Law (8th ed. 1984 Supp.) § 484, pp. 440-441.) We find no reference to or definition of permits that "run with the land" or the consequences attendant upon the creation of such an interest in real property. Neither *Cohn* nor *McDougal* refer to or discuss provisions of our Civil Code defining and explicating the creation and the effect of coventants running with the land. Covenants that run with the land are contained in grants of estate in real property and bind successors in interest (Civ. Code, § 1460). The only covenants that run with the land are those specified in Civil Code, Division Third, Title 3 (Civ. Code, § 1461). Civil Code sections 1462-1470 deal with various consequences attaching to cov-

enants running with the land in all instances reiterating the subsisting need for a grant of an estate in real property.[7]

Cohn and *McDougal* on their facts used the phrase "run with the land" as meaning owners or immediate successors in interest to the original issuees of conditional use permits were entitled to the benefits and subject to the burdens of the permits under equitable concepts sounding in estoppel. Neither case is authority for the proposition urged upon us by the City and the Tenants that conditional use permits are covenants running with the land (e.g., 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, §§ 676-679, pp. 4589-4594).

C

The Owners acquired title through their predecessors who purchased the project from HUD. The grant deed conveying the project to the predecessors is subject to easements, restrictions and reservations of record. The conditional use permit as issued in 1962 and revised in 1963 was never recorded and is not mentioned in the deed. The purchasers were required to sign a Regulatory Agreement (used for entities other than non-profit) requiring compliance with local laws providing among other things for nondiscrimination and equal opportunity in housing and conformance to rental rates established by the Federal Housing Administration. The Regulatory Agreement does not contain any provisions limiting rentals to elderly persons.

The Tenants and the City contend the Owners had constructive notice of the conditional use permit requirements

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[7] 4 Miller & Starr, Current Law of California Real Estate, §§ 25.1-25.4, Bancroft-Whitney Co. (1977).

the project was non-profit and for senior citizens. There are two answers to this contention. The record does not include any evidence to support it and, as we have seen, the permit itself does not give notice of such requirement. We note, however, the Owners are charged with notice the project rentals were required to conform to HUD rates for low and moderate-income families. While low-income housing may qualify as a public interest project under the condominium conversion ordinance, the conditional use permit was granted for elderly housing and City denials of conversion were based on failure to perpetuate such use.

We conclude the denial of the subdivision maps and refusal to issue the condominium conversion permits on the basis the project was a public interest project requiring a perpetuation of use for elderly housing is not supported by substantial evidence. We thus do not reach the issue of constitutionality of the condominium conversion ordinance concluding as we do the project does not fall within a public interest project as defined in the ordinance.

VII

We next consider Owners' contentions the applications for the subdivision maps should have been granted by the City. The Owners contend (1) the reasons stated by the City for denial are not grounds for denial under the Subdivision Map Act (Gov. Code,[8] § 66474), and (2) the maps were not inconsistent with local zoning as a matter of law as well as fact.

Section 66474, subdivisions (a) and (b), allows denial of a tentative subdivision map on the basis of specific find-

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[8]All statutory references are to the Government Code unless otherwise specified.

ings of inconsistency with general and specific plans. The Subdivision Map Act (Gov. Code. tit. 7, div. 2, § 66410, et seq.) as to Subdivision Map Act issues presented here is applicable (San Diego Mun. Code, § 102.0101). San Diego's general plan and the specific plan applicable to the project area do not include any reference to or definite objectives or portions specifically directed to the conversion of existing buildings into condominium projects. Accordingly, the City may not deny the tentative maps on the basis of inconsistency with the general plan or a specific plan (§ 66427.2). The Subdivision Map Act does not specifically allow denial of the tentative maps for inconsistency with zoning or city development regulations. While San Diego as a charter city may adopt subdivision map procedures supplemental to the state Subdivision Map Act (*Benny v. City of Alameda* (1980) 105 Cal.App.3d 1006, 1011), San Diego subdivision map provisions do not specify zoning or city development regulation inconsistencies as grounds for disapproving tentative maps. We not specific requirements for approval are provided for tentative maps of property in the City's planned urbanizing area as defined in the City's Progress Guide and General Plan (San Diego Mun. Code § 102.0301). Additionally, we find no evidence in the record supporting the City's findings of inconsistency as to zoning and development regulations.

We thus agree with the Owners. Denial of approval of the subdivision maps for inconsistency was wrong as a matter of law and fact.

VIII

The court mandated the Owners to operate the project on a non-profit basis and to rent apartment units to per-

sons aged 55 years or older or to people living together one of whom has attained that age. As we have seen, the conditional use permit as issued and amended does not require the project be now so operated and rented by the Owners. Further, we find no evidence in the record to support the court's definition of non-profit, i.e., gross operating income not to exceed reasonable operating expenses or the court's conclusion persons aged 55 or over are senior citizens as that phrase is used in the conditional use permit. The condominium conversion ordinance defines elderly persons as being aged 62 years or older.

The judgments are reversed, the injunction is vacated and set aside and the cases are remanded to the court to consider whether the matters should be returned to the City for reconsideration in the light of our opinion or to order the City to take such further action as may be enjoined upon it by law or otherwise, all as provided in Code of Civil Procedure section 1094.5, subdivision (f). The order staying the rent increase is vacated.

CERTIFIED FOR PUBLICATION.

/s/ Butler, J.

WE CONCUR:

/s/ Brown, P.J.

/s/ Work, J.

APPENDIX "C"

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

L.A. 31987

(Super Ct. Nos. 448425 and 456802)

SPORTS ARENAS PROPERTIES, INC., et al.,

Plaintiffs, Cross-defendants and Appellants,

v.

CITY OF SAN DIEGO, et al.,

Defendants, Cross-complainants and Respondents.

UNIVERSITY CITY VILLAGE TENANTS ASSOCIATION, et al.,

Interveners and Respondents.

(Filed December 31, 1985)

Plaintiffs appeal from a judgment enjoining them from renting their apartments except to senior citizens on a non-profit basis.[1] We conclude that the injunction must be vacated because the trial court misinterpreted the conditional use permit pursuant to which the project was to be built.

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[1]The judgment also denied a petition for writ of mandate seeking to compel defendant city to approve conversion of the apartments to condominiums. Although plaintiffs appealed, they have abandoned their appeal from this part of the judgment.

In March 1962, the Foundation for Specialized Group Housing applied to the City of San Diego "to construct and operate a non-profit senior citizen housing project under the requirements specified in the Federal Housing Act, Title II, Section 231. The project will consist of 549 apartment units in 78 buildings providing beautiful and adequate community facilities. The project will be operated by a qualified non-profit organization, The Foundation for Specialized Group Housing. Occupancy is restricted to senior citizens who qualify."

The city owned the property at the time of the application but a month later the city conveyed the property to University City, Inc., a corporation organized for profit.

Although its planning commission recommended denial of the application,[2] the city issued the conditional use permit in June as follows:

"That Conditional Use Permit, Case No. 4826, requested by The Foundation for Specialized Group Housing to construct and operate a non-profit Senior Citizens Housing project located south of Governor Drive between Genesee Avenue and Boundary Freeway, in the R-1 zone, documented as No. 639744, May 31, 1962, in the office of the City Clerk, be, and the same is hereby approved subject to the following conditions:

"1. That prior to the issuance of any building permits, complete building plans of the proposed senior citi-

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[2]The planning commission objected to the project's density; the developers claimed that because the project was for senior citizens, it would house fewer people than a similar project not so limited.

zens housing project (including signs) shall be submitted to the Planning Director for approval. Said plans shall be in substantial conformity with Exhibit 'A' on file in the Office of the Planning Department. The property shall be developed in accordance with the approved building plans except where regulations and this and/or other governmental agencies require deviation therefrom."

Seven additional conditions were appended to the permit relating to matters such as the filing of a subdivision map, landscaping and parking, but none of the other conditions mentioned "senior citizens" or "nonprofit." The conditional use permit was not recorded by the county recorder. There is no provision in the permit expressly prohibiting sale or transfer of the property.

The foundation did not acquire the property or construct or operate the project. University City, Inc., in 1963 submitted a revised plot plan reducing the number of units, deleting a medical facility, and adding a nine-hole golf course. The documents submitted did not include any references to "senior citizens" or "nonprofit." The revision was approved.

The property was transferred between several profit corporations apparently affiliated with University City, Inc., and was ultimately built with private financing insured under section 211 of title II of the National Housing Act (12 U.S.C.A. § 1715*l*) as low- and moderate-income housing rather than section 231 of the act (12 U.S.C.A. § 1715v). Tenants initially were limited to those 50 years of age or older.

The developers were able to rent only about one-third of the units, and they defaulted on the federally insured

financing. The Department of Housing and Urban Development (HUD) acquired the project from the lender in accordance with its insurance agreement and operated the project for nearly three years renting to persons 21 years of age or older. In 1968, HUD sold the properties to an affiliate of one of the plaintiffs and the predecessor of the other. HUD received a down payment and a note secured by deed of trust for more than $6 million. After the HUD sale, the property was owned and operated by profit corporations under a letter agreement with HUD. Under the agreement, the total amount of rent to be charged was fixed to cover estimated expenses and debt service and to provide a profit to the owners. It does not appear that any means test was applied to tenants. Property taxes were paid on the property.

The property was refinanced, and the HUD note was paid off. In 1979 plaintiffs filed an application for a tentative subdivision map to convert to condominium units. The city denied the application.

Plaintiffs then commenced the instant proceeding to compel the city to permit conversion to condominiums. They also sought declaratory relief. The city answered and filed a cross-complaint seeking an injunction to require plaintiffs to operate the project on a nonprofit basis and to rent only to senior citizens. One of the tenants and the tenants' association intervened and supported the city's position.

The trial court denied the petition for writ of mandate and enjoined plaintiffs from operating the apartments on other than a nonprofit basis and from renting any apartment unless one tenant in it is at least 55 years

old. Nonprofit basis was defined as meaning that "gross operating income does not exceed reasonable operating expenses."[3]

THE CONDITIONAL USE PERMIT

A. *Existence of a Restriction*

Plaintiffs first contend that the conditional use permit did not restrict the use of the property to nonprofit senior citizen rental housing because the express conditions of the permit did not include requirements that the property be used for senior citizens on a nonprofit basis. It is urged that only the conditions enumerated restrict the permit, that the terms nonprofit and senior citizen appear in the recitals of the permit, that there is no reference to nonprofit in the conditions and that the only reference to senior citizen in the conditions is merely to describe the project and is not a limitation.

Ordinarily, a zoning ordinance permits certain uses for an area but provides that other uses may be permitted after consideration by a governmental agency as to whether the proposed other use will be in the best interests of public convenience and necessity and not contrary to the public welfare. (Upton v. Gray (1969) 269 Cal.App.2d 352, 357; Tustin Heights Assn. v. Bd. of Supervisors (1959) 170 Cal.App.2d 619, 626.) A conditional use permit, unlike a nonconforming use, allows a use permitted rather than proscribed by the zoning regulations, but because of the possibility that the permitted use could be incompatible

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[3]During the pendency of this proceeding, plaintiffs increased rents; we stayed further increases.

in some respects with the applicable zoning, a special permit is required. (County of Imperial v. McDougal (1977) 19 Cal.3d 505, 510.)

When a conditional use permit is obtained, the permittee may make those uses of the property authorized by the zoning ordinance in the absence of a permit and in addition those uses authorized by the permit. But the conditional use permit does not permit uses authorized neither by the permit nor by the zoning ordinance without permit. Thus, the use permitted is both a grant of authority to use and a limitation on the authorized uses of the property.

The conditions of the permit further limit the authority to use the property pursuant to the use permit, and if the permittee exercises its authority to use the property in accordance with the permit, it must accept the burdens with the benefits of the permit. (County of Imperial v. McDougal, *supra,* 19 Cal.3d 505, 510-511.) Absence of conditions in the use permit does not mean that the permittee may make uses of the property permitted neither by the use permit nor by the zoning ordinance without permit.

We reject plaintiff's claims that the absence of express conditions limiting the use to nonprofit and senior citizens means that the property was not limited to those uses. The use of the property after issuance of the permit was limited to those uses permitted by the zoning ordinance in the absence of permit and the one authorized by the permit, a "non-profit Senior Citizens Housing project."

B. *Interpretation and Validity of the Restriction*

Plaintiffs next urge, and the Court of Appeal concluded, that the terms of the conditional use permit are

vague, uncertain and ambiguous and may not be enforced.[4] However, the permit must be read in the light of the appli-

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[4]In concluding that the conditional use permit was vague, uncertain and ambiguous, the Court of Appeal pointed out:

"The National Housing Act (tit. 12, U.S.C.A., ch. 13, §§ 1701-1750g) refers to public or nonprofit private agencies. 'The term "corporation" means any incorporated private institution or foundation [¶] (A) no part of the net earnings of which inures to the benefit of any member, founder, contributor, or individual; [¶] (B) which has a governing board (i) the membership of which is selected in a manner to assure that there is significant representation of the views of the community in which such project is located, and (ii) which is responsible for the operation of the housing project assisted under this section; and [¶] (C) which is approved by the Secretary as to financial responsibility.' (§ 1701q(d)(2).)

"Nonprofit activities, nonprofit associations, nonprofit charitable organizations, nonprofit community organizations, nonprofit cooperative associations, nonprofit corporations, nonprofit organizations, nonprofit property owners' associations and other nonprofit agencies found in our codes suggest myriad forms of such activities and include specific definitions (see West's Ann. Cal. Codes, Gen. Index, MO to Q (1981 ed.)).

"The phrase 'senior citizen' did not have a legal or dictionary definition in 1962. The National Housing Act, *supra*, as of 1962, defined elderly persons as 62 years of age or older (§ 1701q(d)(4); § 1715l(f); § 1715v(a)(2)). The Slum Clearance, Urban Renewal and Farm Act defined elderly persons as 62 years of age or older (tit. 42, ch. 8A, § 1471). The Social Security Act defines an aged individual as 65 years or older (tit. 42, U.S.C.A., ch. 7, Social Security, § 1382c; § 1395c). . . .

"California legislation enacted since 1962 uses various phrases in reference to older persons. The California Interdepartmental Committee on Aging provides services and programs for 'older Californians' (Welf. & Inst. Code, §§ 9340-9353) and area agency aging advisory councils are concerned with 'older persons' (Welf. & Inst. Code, §§ 9360-9365). The Elder Abuse Reporting Act refers to an 'elder' as a person 65 years of age or older (Welf. & Inst. Code, §§ 9380-9386). In 1977, the phrase 'senior citizen' first appears in the Multipurpose Senior Citizens Project legislation in defining a 'senior citizen

(Continued on following page)

cation for it, and when that is done, it is apparent that the terms of the permit are clear. The application shows that the nonprofit senior citizens housing project is described in the Federal Housing Act, title II, section 231. The permit states that the application is "approved." It is apparent that the city council by approving the application intended that the terms "non-profit Senior Citizen Housing project" in the permit have the same meaning as that term is given in the application, a project "under the requirements specified" in section 231. That section establishes the definition of nonprofit senior citizen housing.

Section 231 added in 1959 (73 Stat. 665 [12 U.S.C.A. § 1715v]) established a program for insurance of mortgages on housing for the elderly by the federal government. The purpose of the section "is to assist in relieving the shortage of housing for elderly persons and to increase the supply of rental housing for elderly persons." The term "elderly person" is defined as any person who is 62

(Continued from previous page)

as a person 65 years of age or older (Welf. & Inst. Code, §§ 9400-9413) and in 1983 the Multipurpose Senior Services Program provided for persons aged 65 or older (Welf. & Inst. Code, §§ 9520-9527) and the Foster Grandparent Program refers to those participating as being 60 years or older (Welf. & Inst. Code, §§ 9400-9409). The Senior Companions Program defines adults 60 years of age or older as 'senior companions' (Welf. & Inst. Code, §§ 9540-9544). The California Community Crime Resistance Program defines an 'elderly or senior citizen' as an individual 55 years of age or older (Pen. Code, § 13841, subd. (b)). A claimant under the Senior Citizens Homeowners and Renters Property Tax Assistance Law is an individual 62 years of age or older (Rev. & Tax. Code, § 20505) who owns or rents a residence. The California Commission on Aging acts on behalf of 'older persons' (Welf. & Inst. Code, § 9201)."

years of age or over. The word "housing" is defined as eight or more new or rehabilitated living units, not less than 50 percent of which are specially designed for the use and occupancy of elderly persons.

The section provides that the mortgages insured may be equal to the lesser of certain maximum amounts per unit and replacement cost of the project if executed by a nonprofit corporation or public agency, and if not so executed, 90 percent of replacement cost, which may include an allowance for builder's or sponsor's profit and risk of 10 percent of costs other than land. A nonprofit corporation is organized for purposes other than profit of the organization or persons identified with it. (24 C.F.R. § 231.2(j).) The nonprofit corporation is one "regulated or supervised under Federal or State laws or by political subdivisions of States, or agencies thereof, or by the Secretary under a regulatory agreement or otherwise, as to rents, charges, and methods of operation." (12 U.S.C.A. § 1715v(c)(3).)

Under the section the mortgage must provide for a complete amortization. (12 U.S.C.A. § 1715v(c)(5).) The section incorporates provisions (12 U.S.C.A. § 1713) dealing with foreclosures for default, operation by HUD of properties acquired, and resale.[5] When property is acquired, the property may be sold for cash or credit or leased in the discretion of the Secretary of HUD for the

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[5]Section 221 of title II of the National Housing Act under which the project was originally financed contains roughly similar provisions for insurance of mortgages for housing for low- and moderate-income families and displaced families. (12 U.S.C.A. § 1715*l*.)

protection of the insurance fund. 12 U.S.C.A. § 1713 (*l*); 24 C.F.R. § 290 et seq.)

Although section 231 does not use the term "senior citizen" but instead the term "elderly person," the two terms must be treated as identical otherwise the section, contrary to the express terms of the application, would not be applicable. It is also clear that "nonprofit" as used in the section means a nonprofit corporation as mortgagor; the word is not used in the section to refer to operation on a nonprofit basis.[6]

We conclude the conditional use permit incorporated the provisions of section 231 and and therefore the permit is not vague, uncertain or ambiguous in using the term nonprofit senior citizen housing. However, it does not follow that the injunctions may be sustained on the basis of the permit.

C. *The Condition and the Injunction*

The permit did not restrict the use of the property to nonprofit senior citizen housing in the event that HUD was required to take over the project under its guarantee. When HUD took over the property, it was not under a

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[6]A nonprofit organization which successfully manages a section 231 project would ordinarily make substantial gains. As pointed out above, the mortgage must provide for complete amortization (12 U.S.C.A. § 1715v(c)(5)), and during the amortization period, a successful nonprofit organization would be building equity and at the end of the period it would be in the same position as another owner which had paid off its mortgage. Increases in equity would permit a nonprofit organization dedicated to providing housing for the elderly to refinance and build additional projects, furthering the congressional purpose of increasing the supply of housing for the elderly.

duty to sell the property to a nonprofit agency but could sell to profit-making organizations, and it was not under a duty to limit the use of the property to senior citizens or moderate- or low-income tenants.

The permit, as we have seen, incorporates the provisions of section 231. Thus it incorporates the part of the section expressly incorporating the provisions of 12 United States Code Annotated section 1713(*l*). (12 U.S.C.A. § 1715v(e); see also 12 U.S.C.A. § 1715*l* (g).) The term "non-profit Senior Citizens Housing Project" in the permit used to describe the project described in the application may not reasonably be interpreted to incorporate the provisions of section 231 and at the same time to exclude some of the provisions of the section. Under section 1713(*l*) HUD is authorized to sell property acquired for cash or credit in its discretion for the protection of the insurance fund. While local concerns and the purposes for which the project was built are factors to be considered in disposing of multifamily projects, the factors are to be considered along with HUD's objective of protecting the financial interests of the government and producing a satisfactory return to the mortgage insurance funds. (24 C.F.R. § 290.20.) Obviously, limitation of sale to a nonprofit agency could seriously impair HUD's ability to protect the insurance funds. Since the permit provision for nonprofit senior citizen housing contemplated sale to a profit-making organization by HUD upon such limitations as it found proper, the trial court could not properly impose additional limitations on the basis of the provision.

Because the conditional use permit authorized a section 231 project, HUD, once it acquired the property under

its guarantee, had the power to determine to whom it would sell and the restrictions to be placed on the purchaser. It does not appear that plaintiffs are in violation of any HUD restrictions.

D. *Failure to Comply With the Permit*

The developer of the project did not proceed under section 231 and the project was not operated by the Foundation for Specialized Group Housing, a nonprofit corporation, as provided in the application for the permit. Thus the project was not built and operated in accordance with the permit. Section 231 financing and regulation applies only to new projects and certain new rehabilitation projects. It does not seem possible at the present time to comply with the permit without tearing the project down.

The question arises whether the failure to comply with the permit or other applicable zoning furnishes a ground to require the present owners of the project to operate on conditions other than those specified in the permit.

While there may be other cases where the failure to comply with a permit might justify regulations other than those provided for by the permit, this is not such a case. First, the present owners are not the ones who failed to comply with the permit. Secondly, it does not appear that the failure to comply with the permit requirement of financing under section 231 and operation by a nonprofit corporation was of substantial importance in the light of subsequent events. The developer, a profit-making corporation, proceeded under section 221, and it defaulted. The provisions of sections 221 and 231 are the same in most relevant respects except that section 221 is limited to moder-

ate- and low-income housing while section 231 requires at least one-half of the units be designed for the elderly. Since the elderly can also rent section 221 housing, it does not appear how section 231 housing would have increased the number of tenants.[7] Similarly, it does not appear how a nonprofit operator would have been able to rent substantially more than one-third of the units and prevented default.[8]

The portion of the judgment enjoining plaintiffs from renting except to senior citizens on a nonprofit basis is reversed.

BROUSSARD, J.

WE CONCUR:

MOSK, J.
REYNOSO, J.
GRODIN, J.
LUCAS, J.
*KAUS, J.

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[7]A 1978 survey showed that 72 percent of the units were occupied by persons 67 or older.

[8]There is no reason to assume that the initial rents at a project built under sections 221 and 231 will vary significantly if the project is owned by a nonprofit rather than a profit corporation.

So long as the builder is able to construct the project at or below the maximum allowed per unit, rents should not be substantially affected by the fact that the owner of the project is a profit-making organization rather than a nonprofit agency. The nonprofit owner may obtain a larger loan on the property, requiring larger principal and interest payments to amortize, and the difference should largely offset the profit on investment allowed the profit-making organization.

* Retired Associate Justice of the Supreme sitting under assignment by the Chairperson of the Judicial Council.

C O P Y

SPORTS ARENAS PROPERTIES, INC. v. CITY OF SAN DIEGO,

L.A. 31987

CONCURRING AND DISSENTING OPINION BY BIRD, C.J.

I write separately to express my concern that the majority's result undermines the City of San Diego's legitimate efforts to provide affordable rental housing for the poor and elderly.

Although I agree with the majority's conclusion that the provisions of the conditional use permit are valid and binding upon successors-in-interest (see maj. opn., *ante*, at p. — [typed opn. at p. 7]), I cannot agree that the violation of these terms does not justify the imposition of an injunction.

The majority posit that HUD's ability to protect its mortgage insurance funds would be seriously impaired if the limitations in the permit were deemed applicable to HUD and subsequent purchasers. That conclusion is somewhat surprising given the marked lack of evidence in the record to support it. The majority evade this problem by creatively holding that (1) HUD has the power to determine the restrictions to be placed on a property once HUD acquires it; (2) this power was implicitly authorized in the original permit; and (3) the conditions delineated in the permit are superfluous and, therefore, constitute "additional limitations" which equity deems unenforceable. (Maj. opn., *ante*, at pp. — - — [typed opn. at pp. 12-13].)

Contrary to the majority's assertion, Title II of the National Housing Act (12 U.S.C.A. § 1713 (*l*)) does *not*

authorize HUD to ignore land use regulations propounded by the city in the name of ensuring a satisfactory return on insurance funds. (Maj. opn., *ante,* at p. — [typed opn. at p. 12].) Moreover, even assuming that it did, there has not been an adequate showing that "HUD's objective of protecting the financial interests" of the fund (maj. opn., *ante,* at p. — [typed opn. at p. 12]) justifies the denial of safe and sanitary housing for the elderly and other vulnerable groups.

California faces an acute shortage of decent housing for its citizens. In 1980, the Legislature recognized this shortage as one of California's more pressing public concerns. It declared the attainment of a "suitable living environment for every California family" to be "a priority of the highest order." (Gov. Code, § 65580; see also Nash v. City of Santa Monica (1984) 37 Cal.3d 97.) While the private marketplace may meet the housing needs of those at higher income levels, the needs of other economic segments remain unfulfilled.

I am concerned that the majority's interpretation of the relevant sections of the National Housing Act (12 U.S.C.A. §§ 1715v, 1713(*l*)) would enable the circumvention of the city's carefully drafted plan to ensure affordable housing for *all* of its citizens. In light of these concerns, I cannot join the opinion of my brethren.

BIRD, C.J.